

1 Scott J. Street (SBN 258962)
2 JW HOWARD/ATTORNEYS, LTD.
3 201 South Lake Avenue, Suite 303
4 Pasadena, CA 91101
5 Tel.: (213) 205-2800
6 Email: ssstreet@jhowardattorneys.com

7 John W. Howard (SBN 80200)
8 JW HOWARD/ATTORNEYS, LTD.
9 600 West Broadway, Suite 1400
10 San Diego, CA 92101
11 Tel.: (619) 234-2842
12 Email: johnh@jhowardattorneys.com

13 Attorneys for Plaintiff
14 PETER MCNEFF

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 PETER MCNEFF,
18 Plaintiff,
19 vs.
20 THE CITY OF PLEASANTON, et al.,
21 Defendants.

22 Case No. 23-cv-00106-AMO
23 Assigned to Hon. Araceli Martinez-
24 Olguin

25 **SUPPLEMENTAL BRIEF
26 REGARDING DEFENDANTS'
27 MOTION TO DISMISS SECOND
28 AMENDED COMPLAINT**

29 Action Filed: January 10, 2023

30 ///

31 ///

32 ///

1 The May 29 order stated that the Court may dismiss Peter McNeff's case in its
 2 entirety, with prejudice. ECF 56. That would be a mistake.

3 Defendants did not move to dismiss the first cause of action for failure to state a
 4 claim against Police Chief Larry Swing, so that act would be *sua sponte*. ECF 48.
 5 “*Sua sponte* dismissals are strong medicine, and should be dispensed sparingly.”
 6 *Chute v. Walker*, 281 F.3d 314, 319 (1st Cir. 2002) (quotations omitted). “Only where
 7 it is crystal clear that the plaintiff cannot prevail and that amending the complaint
 8 would be futile can a *sua sponte* Rule 12(b)(6) dismissal stand.” *Garayalde-Rijos v.*
 9 *Municipality of Carolina*, 747 F.3d 15, 22-23 (1st Cir. 2014) (quotations omitted).

10 This is a high standard. “The party defending the dismissal must show that the
 11 allegations contained in the complaint, taken in the light most favorable to the
 12 plaintiff, are patently meritless and beyond all hope of redemption.” *Chute*, 281 F.3d
 13 at 319 (quotations omitted).

14 That is not the case here. The Second Amended Complaint (“2AC”) contains
 15 many detailed allegations against Chief Swing, including that: (1) he placed Mr.
 16 McNeff on administrative leave because he did not like McNeff’s conservative
 17 political views, views that Chief Swing learned about after McNeff attended a
 18 political rally off-duty (as he was allowed to do) on January 6, 2021 (2AC, ¶ 17); (2)
 19 he wanted to fire McNeff because of McNeff’s conservative political views, and he
 20 ordered an investigation into McNeff’s past social media use to conceal that animus
 21 and create a pretext to fire him (2AC, ¶¶ 17-19); and (3) he instituted termination
 22 proceedings against McNeff in bad faith, not because McNeff violated city policy but
 23 because he did not like McNeff’s conservative political views and wanted to purge the
 24 police department of them (2AC, ¶¶ 18-23).

25 Each of those actions is an adverse employment action that can support a First
 26 Amendment retaliation claim. *Coszalter v. City of Salem*, 320 F.3d 968, 975-77 (9th
 27 Cir. 2003); *see also Dahlia v. Rodriguez*, 735 F.3d 1060, 1079 (9th Cir. 2013) (en

1 banc) (placing an employee on leave can constitute adverse employment action).

2 Mr. McNeff can buttress those allegations with additional facts, including
 3 details about why Chief Swing knew that the “anonymous” complaint he received on
 4 January 10, 2021, came from an officer who shared his political animus. That includes
 5 the temporal proximity to another politically driven complaint plus the fact that
 6 McNeff attended the rally on his own time, in civilian clothes. Furthermore, the social
 7 media account McNeff used is a private account that uses a pseudonym. Thus, there
 8 was no way for anybody outside the department to recognize him.

9 In any event, this knowledge is a small part of the claim. It relates to only one
 10 of the three adverse actions Swing took against McNeff (the initial suspension). It is
 11 background. What matters is that Swing relieved McNeff of duty “to punish McNeff
 12 for his conservative political views and protected political activity.” (2AC, ¶ 17.)

13 This reasoning extends to Defendants’ qualified immunity argument. As an
 14 affirmative defense, a qualified immunity based “Rule 12(b)(6) dismissal is not
 15 appropriate unless [a court] can determine, based on the complaint itself, that qualified
 16 immunity applies.” *Groten v. Cal.*, 251 F.3d 844, 851 (9th Cir. 2001). The Court must
 17 do “an individualized analysis to determine whether each moving defendant [is]
 18 entitled to qualified immunity based on his or her individual actions” *Cunningham*
 19 *v. Gates*, 229 F.3d 1271, 1282, 1287 (9th Cir. 2000).

20 Defendants did not do that. Their motion contained virtually no discussion of
 21 Chief Swing. They just said there was no reason he “should have known that firing an
 22 employee for a violation of City policies was a clearly established constitutional
 23 right.” ECF 48, at 16:12-14.

24 That is not what the 2AC alleged, though. Granting qualified immunity based
 25 on an argument that contradicts the face of the pleadings (and is done essentially *sua*
 26 *sponte* with respect to Swing) would constitute reversible error, especially given the
 27 Supreme Court’s recent opinion in *National Rifle Association v. Vullo*, which, among

1 other things, criticized the Second Circuit for “taking the allegations in isolation and
 2 failing to draw reasonable inferences in the NRA’s favor in violation of this Court’s
 3 precedents.” ECF 57, at pp. 22-23 (pp. 15-16 of slip opinion); *see also id.* at p. 26
 4 (page 19 of slip opinion) (explaining clearly established principle that “the First
 5 Amendment prohibits government officials from wielding their power selectively to
 6 punish or suppress speech”).

7 Mr. McNeff can also add allegations about the scope of the City Manager’s
 8 delegation of policymaking authority to Chief Swing. For example, we would allege
 9 that Chief Swing believed the buck stopped with him, that Chief Swing was not
 10 constrained by any policies not of his own making, and that, despite the appeal
 11 process, the City Manager had a longstanding policy of doing whatever the Police
 12 Chief wanted regarding police officer discipline, such that Chief Swing’s decisions
 13 were not actually subject to review by another city official. The Ninth Circuit has
 14 deemed similar evidence sufficient to “create a triable issue of material fact” on this
 15 issue. *Barone v. City of Springfield*, 902 F.3d 1091, 1109 (9th Cir. 2018). Given that
 16 no discovery has been done, we would omit *Monell*’s ratification theory for now.

17 Finally, although discovery has not started, further investigation suggests that
 18 Captain Cox was following Chief Swing’s orders and may not have shared Swing’s
 19 retaliatory intent. Thus, Mr. McNeff is willing to dismiss Captain Cox from the case.
 20 That would resolve any issues related to him.

21 Respectfully submitted,

23 Dated: June 4, 2024

JW HOWARD/ATTORNEYS, LTD.

25 /s/ Scott J. Street

26 Scott J. Street

27 Attorneys for Peter McNeff

CERTIFICATE OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed by JW Howard/Attorneys, LTD. in the County of San Diego, State of California. My business address is 600 West Broadway, Suite 1400, San Diego, California 92101.

On June 4, 2024, I caused the **SUPPLEMENTAL BRIEF REGARDING DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT** to be filed and served via the Court's Electronic Service upon the parties listed on the Court's service list for this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 4, 2024 at San Diego, California.

/s/ Dayna Dang
Dayna Dang, Paralegal
dayna@jwhowardattorneys.com

JW HOWARD/ ATTORNEYS, LTD.
600 WEST BROADWAY, SUITE 1400
SAN DIEGO, CALIFORNIA 92101